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In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. 623.

CHARLES PEYTON WEST, *et al.*,
Petitioners,

vs.

THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Certiorari.

SUPPLEMENTARY STATEMENT OF FACTS.

This case was admitted to this Court on certiorari in 1940 and a decision of the Circuit Court of Appeals denying any recovery to the plaintiffs* was reversed. *West v. American Telephone and Telegraph Co.*, 311 U. S. 223. On remand the Circuit Court of Appeals affirmed the judgment of the District Court which gave to the plaintiffs precisely what their father's will provided—a remainder interest after the death of their stepmother in 92 shares of stock of The American Telephone & Telegraph Company.

The plaintiffs are dissatisfied with this decree and they have filed this petition for certiorari in a further attempt to secure the following: (1) the immediate issuance to them of a certificate for 92 shares which would give them not only the remainder but the unexpired balance of the life estate of Grace C. West, who is still alive; and (2) the

* The petitioners were plaintiffs and the respondent was defendant. For convenience they are referred to in this brief as they appeared in the District Court.

dividends on such stock from November 2, 1929, when the alleged wrongful transfer took place to date; and (3) interest on the dividends; and (4) damages representing the difference between the highest market value reached after November 2, 1929, and the market value at the time of the demand; and (5) interest on such damages from the date of the demand.

The market value of the stock was approximately $235 per share on November 4, 1929, $275 at the highest intermediate value on April 15, 1930, and $165 on the day of demand (R. 48) and it paid $9 per share dividends in each year. What the plaintiffs ask with respect to each of the 92 shares is a new certificate for the entire interest, plus eleven years' dividends amounting to $99, and legal interest (6%) thereon amounting to $33, plus damages amounting to $110, plus interest thereon amounting to over $20. This would give the plaintiffs a recovery of $262 per share over and above the remainder on each share and, in addition, the dividends hereafter paid during the life of their stepmother. Such is the *equitable* relief to which plaintiffs claim they are entitled.

The legal theory by which they claim to support such a recovery is that the stepmother by her transfer of complete title forfeited her life estate and accelerated the plaintiffs' remainder. The Ohio Court of Appeals and both lower federal courts rejected this theory.

The defendant's liability is predicated on mere negligence in issuing stock certificates in the name of the plaintiffs' stepmother without any indication thereon that she was only a life tenant. The plaintiffs' stepmother, on the other hand, misappropriated to her own use the plaintiffs' interest in this stock.

ARGUMENT.

I. NO REASON FOR GRANTING CERTIORARI EXISTS.

The plaintiffs advance three reasons why, in their view, certiorari should be granted. (Pl. br. pp. 9, 10)

1. It is claimed that the Circuit Court of Appeals "misconceived the law of the sovereign state of Massachusetts." Manifestly misconception of state law by a federal court does not in itself raise any federal question, nor any question of public importance. In virtually every case in the federal courts based upon diversity of citizenship, it is claimed by one side or the other that the federal court has misconceived some state law.

The only clause of Rule 38(5)(b) of the rules of this Court which has to do with misapplication of state law is that referring to a decision of "* * * an important question of local law in a way probably in conflict with applicable local decisions * * *." The phraseology of this part of the rule obviously makes reference to the law existing before *Erie Railroad v. Tompkins,* 304 U. S. 64 (1938), when the only common law of the state binding on the federal courts was that deemed to be peculiarly "local." This Court may well have occasion to contract the scope of this part of Rule 38, as it has the part dealing with a conflict between decisions of the Circuit Courts of Appeals. (*Ruhlin v. New York Life Insurance Company,* 304 U. S. 202 (1938) discussed below.) Manifestly this Court cannot review all the decisions in which there is a claimed conflict with the state law which is applicable under *Erie Railroad v. Tompkins.*

In any event, it is plain that the question of Massachusetts law which the plaintiffs assert is involved in this case is anything but "important." Whether or not a wrongful conveyance by a life tenant results in acceleration of the remainder is a question having its genesis in the feudal land law of England. It applied only to livery of seisin, hence not to personalty, and with the use of the

bargain and sale as the customary conveyancing device the doctrine passed into disuse even at common law and has been abolished by statutes and decisions in the United States. 1 *Tiffany, Real Property*, 3rd Edition, Section 59; Laws of Massachusetts, Chapter 184, Section 89.

2. The second reason advanced by the plaintiffs for the granting of certiorari is that the Circuit Court of Appeals misconceived the decision of the Supreme Court in *Marshall v. Vicksburg*, 15 Wallace 146. However, the case of *Marshall v. Vicksburg* did not involve a federal question. The holding interpreted a contract. The dictum for which it was cited in this case had to do only with the general principle that equity abhors a forfeiture and was cited in passing by the court below only as corroborative of its view of the law of Massachusetts. (Supplemental Record, p. 5)

It should be noted that Rule 38(5)(b) of this Court refers to a decision of "a *federal* question in a way probably in conflict with the applicable decisions of this court." (Italics supplied)

Likewise, the case of *Big Six Development Company v. Mitchell*, 138 Fed. 279 (1905) did not involve a question of federal law. Therefore, even if there were a conflict between that decision and this no grounds for granting the petition for certiorari exist under the recent decision of this Court in *Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202 (1938).

In the *Ruhlin* case it was held that on questions controlled by state law, conflict among the circuits is not a reason for granting a writ of certiorari. The *Big Six Development Company* case did not involve the law of Massachusetts or New York which the plaintiffs say should have been applied to this case, or Ohio, and, therefore, any conflict between the decision in that case and this is not a conflict in the application of the same law.

Furthermore, no conflict exists between this case and the *Big Six Development v. Mitchell* case. The latter case involved a lease of real property which, the court found, had been ended according to its terms by the lessee's breach. The case was an action to enjoin trespass on the plaintiff's land by the former lessee. Our case involves a testamentary bequest of a life estate in corporate stock. To say, as the plaintiffs do on page 17 of their brief, that the *Big Six Development Company* case "is in exact conflict with the case at bar" is completely unfounded. There is no resemblance either in facts or legal principles between the two cases.

3. The third reason for granting certiorari advanced by plaintiffs is that "the Circuit Court of Appeals misconceived the application of *Erie Railroad v. Tompkins* (1938), 304 U. S. 64, to the instant case in this, that it supposed that it was bound by an announcement made by a majority of the Ohio Court of Appeals on what the law of Ohio is on acceleration."* (Pl. br. p. 10)

The plaintiffs appear to be arguing that a reason for granting certiorari exists because the Circuit Court of Appeals applied the Ohio decision which held, on the very facts of this case, that the remainder was not accelerated. That is precisely what this Court held that the Circuit Court of Appeals must do on the question of demand.

It may be helpful on this point to review the recent history of the litigation. In its first decision the Circuit Court of Appeals disagreed with, and declined to follow, the decision of the Ohio Court of Appeals that a demand was a prerequisite of suit. The plaintiffs secured a reversal of that decision in this Court on the ground that no

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* The plaintiffs' disclaimer (Pl. br. p. 9) of any intention to argue that the decision of the Ohio Court of Appeals on the question of acceleration is not binding because it was a dictum makes it unnecessary to show, as we would otherwise have done, that that decision was not a dictum.

matter how much the Circuit Court of Appeals might disagree with the Ohio Court of Appeals, it must follow its decision in this case. On remand, the plaintiffs completely reversed their position and argued to the Circuit Court of Appeals that the decision of the Ohio Court of Appeals on the question of acceleration of the remainder was wrong, and that the Circuit Court of Appeals was not required to follow it. The Circuit Court of Appeals on remand followed the decision of this Court and applied that part of the decision of the Ohio Court of Appeals which was *against* the plaintiffs (acceleration) in the same way this Court applied that part which was *for* them (demand).

The plaintiffs argue, however, that the Circuit Court of Appeals was free to disregard the decision on the question of acceleration of the remainder, because the law of Ohio did not apply to the question of acceleration of the remainder. This argument is completely disposed of by the fact that the Ohio Court of Appeals, without discussing the matter, held that Ohio law did apply. The Circuit Court of Appeals said it was bound by the decision of the Ohio Court of Appeals (Supplemental Record, p. 5), and clearly under the very recent decision of this Court in *Klaxon Company v. Stentor Electric Mfg. Co.*, 61 Sup. Ct. Rep. 1020 (1941), it was so bound, although the holding of the Ohio Court involved a question of the conflict of laws. The plaintiffs have cited no other Ohio case as to what rule of conflicts should be applied, and consequently under the *Klaxon* case the decision of the Ohio Court of Appeals on the question of acceleration was applicable in the federal court even though the federal court should believe the conflicts rule which was applied to have been erroneous.

There was no objection or contrary argument on the part of the plaintiffs when the Ohio Court of Appeals applied Ohio law to the question of damages. An examination of the petition in the state court (R. 106 *et seq.*) dis-

closes no claim on the part of the plaintiffs that the law of any state other than Ohio applied to any part of the plaintiffs' claim.* If the foreign law is not pleaded it will be presumed to be the same as the law of Ohio. *Mendelsohn v. Mendelsohn*, 123 O. S. 11. Since the plaintiffs could not have raised the objection they now make even in the Supreme Court of Ohio on appeal, *a fortiori* they cannot raise it in the federal courts on collateral attack. Of course the Ohio Supreme Court is still free to apply a different conflicts rule in future cases if it chooses.

Although the Circuit Court of Appeals followed the decision of the Ohio Court of Appeals on the question of acceleration under the rule of *Erie Railroad v. Tompkins*, its decision can be equally supported by the doctrine of *res adjudicata*, which the defendant pleaded and urged in the court below and which is, therefore, open to it now under the decision in *Langnes v. Green*, 282 U. S. 531 (1931). The question of acceleration of the remainder was actually litigated and decided in the Ohio courts and the decision on that point is binding in the federal courts, even though the plaintiffs had available to them an argument as to the applicability of Massachusetts law which they did not present. *Stark v. Starr*, 94 U. S. 477 at page 485; *Aurora City v. West*, 7 Wallace 82 at page 102; *Quinn, Auditor v. State ex rel. Leroy*, 118 O. S. 48 (Headnote 1).

Thus, both by virtue of the decisions of this Court in *Erie Railroad v. Tompkins*, 304 U. S. 64 and *West v. American Telephone & Telegraph Company*, 311 U. S. 223, and by the application of the doctrine of *res adjudicata* the question of acceleration is finally determined in favor of defendant by the decision of the Ohio Court of Appeals.

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* The bill of complaint in the federal court alleges that Massachusetts law controls. (R. 4.) This was after the plaintiffs had been defeated on Ohio law.

II. THE PLAINTIFFS' CLAIM ON THE MERITS IS WITHOUT JUSTIFICATION.

The plaintiffs' entire brief in support of their petition* is devoted to the argument of the merits of the legal claim in this case. We do not understand it to be in accordance with the practice of this Court to answer fully such an argument at this stage. However, we feel required to comment on it very briefly.

Perhaps the most effective answer to the argument is to point out the absurd and highly inequitable conclusion which the plaintiffs reach as to the measure of recovery.

Briefly, they conclude that because their own stepmother misappropriated the remainder in their stock, receiving full value for that remainder, the defendant corporation, for negligently issuing a stock certificate which enabled her to commit this act, should be required not only to give them a remainder interest identical with that which their stepmother misappropriated but also (1) damages which, with interest, amount to $262 for each share of stock and (2) the enjoyment of the income from stock during the balance of their stepmother's life. This is the result to which the plaintiffs say the "*social* and *philosophical* approaches to the question * * * lead * * *." (Pl. Br. p. 21) Clearly the plaintiffs' philosophy and social values are contrary to those of courts of equity in all ages and all jurisdictions and it is unfortunate that the plaintiffs did not explain *why* tens of thousands of other stockholders in similar economic circumstances should pay plaintiffs a profit on their stepmother's wrong.

The plaintiffs' legal argument to reach this result has been rejected by the Court of Appeals of Ohio and the federal District Court and the Circuit Court of Appeals. The plaintiffs rely upon Massachusetts cases dealing with standing timber cut by a life tenant of real estate, fixtures on

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* Beginning on page 11 of their combined petition and brief.

real estate removed by a lessee, and shoe machinery, all easily distinguishable. *Phillips v. Allen,* 89 Mass. 115 (1863), involved *waste* by a life tenant; *Leonard v. Stickney,* 131 Mass. 541 (1881), involved *waste* by a tenant *for years,* and *United Shoe Machinery Company v. Holt,* 185 Mass. 97 (1904), involved a sale by a *bailee.*

But there is a difference even more fundamental. It is that in the only Massachusetts case cited by the plaintiffs where forfeiture affected the amount of recovery, the remainderman was seeking relief against the wrongdoing life tenant, whereas in this case the plaintiffs are seeking to use their hypertechnical theory of forfeiture against a third party to reap for themselves a profit out of the life tenant's wrong, when the third party was negligent at the most and received no benefit whatsoever from its negligence.

The petition for certiorari in this case presents no federal question and no question of public importance and should, therefore, be denied.

Respectfully submitted,

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